No. 83-5943

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

WILLIAM WAYNE GILBERT,

Petitioner,

v.

THE STATE OF NEW MEXICO,

Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of New Mexico

RESPONDENT'S BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

Respondent State of New Mexico pursuant to Rule 34.2 Sup. Ct.R., includes herein a Statement of the Case only to the extent necessary to correct the inaccuracies or omissions in Petitioner's Statement of the Case. Petitioner adequately sets out the other requirements of Rule 34.1, Sup. Ct. R. and they are not restated here.

I N D E X

TABLE OF AUTHORITIES

United States Cases:

1. Statement of the Case

The Statement of the Case set out in the Petition, pages 3-6, is erroneous in several important respects. It also purports to abstract the facts from the New Mexico Supreme Court's opinion. Respondent believes it is necessary to note those factual errors. Otherwise, the Statement of the Case is, by and large, factually correct.

The trial court held two suppression hearings. The first was conducted on April 23-25, 28-29, and May 14-15, 1980. This hearing resulted in the trial court's Order of May 22, 1980, which is attached as Appendix B to the Petition. The issue of an alleged illegal detention was not raised at the first hearing. Vol. VI, 1384-1409.

A second suppression hearing was held on October 17, 1980 wherein new counsel for the Petitioner first raised the issue of illegal detention. Vol. VII, 1549-1616. After evidence and argument, the trial court found there was no showing from the new evidence that the police had improperly detained Petitioner to question him further about the homicides for which he was convicted. Vol. VII, 1615-6. This finding is not now challenged by Petitioner.

Petitioner contends that the record does not disclose how the police developed his name as a possible suspect in the Johnson murders, citing Appendix B. Pet. p.4. This aspect of the detention issue was not raised at the first suppression hearing upon which the trial court rendered the Order which is Appendix B.

However, the suppression transcripts amply disclose how Petitioner was developed as a possible suspect. The police learned of Petitioner from two witnesses who were present in the Johnson home the night of the murders. Vol. III, 480; V,

1036-40, 1043, 1046-49, 1052-54, 1057-59, 1062. They both testified they met Petitioner at the Johnson residence the night of and shortly before the murders occurred. Vol. IV, 879-80, 900. Both made tentative identifications of the Petitioner as the person they met at the Johnson residence from police photographic arrays before Petitioner was arrested. Vols. V, 1077-80, 1082; VI 1093-95. One testified he was trying to find some cocaine for Petitioner. Vol. IV, 884.

Petitioner recites that "For unspecified reasons, the police delayed the release of defendant at 9:30." Pet. p. 3. The New Mexico Supreme Court's opinion states that, "The bondsman arrived at the jail at about 9:30 a.m. but was informed by detention officials at about 10:30 a.m. that 'more charges had come up' and that defendant could not be released at that time." State of New Mexico v. Gilbert, 98 N.M. 530, 531, 650 P.2d 814, 815 (1982).

The testimony of the bondsman was that he arrived at jail at approximately 9:30 a.m., asked for Petitioner, waited for an hour, was advised that "they" were talking to him "... And then about a quarter to twelve they (detention officials) come in and said that I couldn't bond him out because more charges had come up." Vol. VII, 1556-7. There was no testimony or other evidence of record that the police ever "delayed" the petitioner's release in order to further question him. The bondsman was unable to specifically identify the detention official who advised him of the additional charges. Vol. VII, 1556, 1559.

The bondsman testified that he never spoke with any police officers about Petitioner's bond that morning. Vol. VII, 1559. Sgt. Ness testified that he was unaware of the presence of the bondsman throughout the course of his contact with Gilbert or that he was otherwise made aware that Petitioner was prepared to bond out. Vol. VII, 1569-72. There is no record evidence that

any police officer directed the detention officials to hold up the bonding process or that additional charges had arisen. There is no record evidence that the Petitioner was not bonded out at 9:30 a.m. by police action of any kind.

At the conclusion of the second suppression hearing in October, 1980, the trial court found that the police did not hold the petitioner for purposes of interrogation knowing that a bondsman was available to obtain his release. Vol. VII, 1615-6.

Petitioner further asserts that homicide detectives Ness and Jasler arrived at the jail, read defendant his Miranda rights, and began to question him, citing Appendix "B" p.2. Pet., p. 4. Respondent State of New Mexico points out this error because it implies that Petitioner was directly questioned at the jail at the same time his bondsman was seeking his release elsewhere in the jail. This assertion is not supported by any testimony, the trial court findings or the facts recited in the Gilbert opinion. When the detectives first arrived at the jail, Petitioner was directly removed from jail and taken to the Albuquerque Police Station, where he was questioned for the first time by detectives. Vol. IV, 572-3; III, 461. The trial court noted that transfer in its findings. Pet. App. B, p.5. The Gilbert opinion also noted this transfer. 650 P.2d at 815.

Petitioner further implies that Ness and Jasler apparently agreed not to question him any further after talking to his attorney, James Brandenberg. Pet. p. 4. This contention is questionable at best. Attorney Brandenberg testified at the second suppression hearing that Sgt. Ness spoke with him briefly and said, "I won't talk to him anymore since I know that you're involved in the case." Vol. VI, 1106, 1119. This conversation occurred while Petitioner had Attorney Brandenberg on the phone. Ness denied giving Brandenberg any such assurance (that Ness would not talk to Petitioner anymore because Brandenberg was in

the case) or that any conversation of that bent even occurred. Vol. IV, 623.

Both Ness and Brandenberg testified that Ness called Brandenberg some time after Petitioner's confession because Ness wanted to let Brandenberg know that he, Ness, had not gone behind Brandenberg's back to obtain Petitioner's confession. Vol. IV, 621; Vol. VI, 1110. The trial court did not make any findings regarding this purported agreement nor was it requested to resolve this as an issue at the second suppression hearing.

Petitioner next contends that despite the foregoing agreement, he was questioned about the Johnson murder scene by the officer taking his fingernail scrapings and who had had been present at the scene of the investigation. Pet. p.4. This claim is clearly erroneous. The officer was Criminalistics Detective Ramirez, who was called in by Detective Jasler to photograph and fingerprint Petitioner. Vol. III, 524-5. Ramirez was informed by either Ness or Jasler that Petitioner was arrested for a shooting incident at the American Sandwich Shop and no more. Vol. III, 526. Ramirez did not know at the time of photographing and fingerprinting Petitioner that he was suspected in the Johnson homicides which Ramirez had worked the day before. Vol. III, 527.

Petitioner engaged Ramirez in conversation about what kind of work he did. Vol. III, 528. Ramirez briefly explained his work and told Petitioner, by way of example, that he had just worked the Johnson scene "yesterday." Petitioner asked, "How were they killed;" Ramirez said they were shot. Petitioner responded that that was "tacky." Vol. III, 529. Other small talk ensued, including whether Petitioner could bond out on the sandwich shop shooting. Petitioner made no incriminating statements. Vol. III, 529-30, 532-3. Petitioner testified he did not remember any conversation with Ramirez during their

contact for photos and fingerprints. Vol. IV, 723-4. The record evidence, inclusive of Petitioner's testimony, does not support the slightest inference that Ramirez questioned Petitioner about the sandwich shop shooting or the Johnson homicides. The trial court found that Petitioner initiated conversation with Ramirez about his work, asked him how the Johnsons were killed, and talked about bond. Pet. App. B, 6-7.

Petitioner also asserts that the opinion in Gilbert I, does not demonstrate how the homicide detectives "learned" that the body of Carol Gilbert, Petitioner's wife, was found in Gilbert's home. Pet. p.4. This is correct. The suppression record does. Sgt. Ness testified that while waiting to fingerprint the Petitioner, he was advised by fellow Detective Joe Garcia that the Sheriff's Office deputies had been to the Defendant's home in Los Lunas and found his wife dead. Vol. IV, 579-80. Detective Jasler was also advised of the same information. Tr. Vol. III, 466-67.

Detective Jasler knew at this point that Petitioner had lied to him a short time before receiving this information. A half an hour before Jasler learned of Carol Gilbert's death, Petitioner told Jasler that his wife was out of town for the weekend and would not return until Sunday afternoon. Vol. III, 466.

The trial court specifically found that the police did not hold the Petitioner in custody for purposes of interrogation, knowing that there was a bondsman waiting to secure his release. Vol. VII, 66-67. Petitioner has not previously nor now challenged this finding. That finding is amply supported by evidence.

SUMMARY OF ARGUMENT

Petitioner was not illegally detained by police detectives in order to question him about other crimes unrelated to his initial lawful arrest.

If the Petitioner was detained without probable cause to arrest for the murders of which he was convicted, the subsequent confession to those murders was attenuated from and not the result of any exploitation of such detention.

The New Mexico Supreme Court correctly applied this Court's attenuation cases to the evidence in Petitioner's case to find no illegal detention.

ARGUMENT

The issue presented by Petitioner is whether his confession was the sole result of an illegal detention without probable cause upon which to base such detention. (Pet., Question for Review, I).

Respondent State of New Mexico submits that the question presented does not warrant review by this Court. The issue has been frequently reviewed by this Court's previous decisions. Those decisions were applied as controlling precedent by the New Mexico Supreme Court in State of New Mexico v. William Wayne Gilbert, 98 N.M. 530, 650 P.2d 814 (1982) (hereinafter Gilbert I).

Petitioner relies upon this Court's opinions in Dunaway v. New York, 422 U.S. 200 (1979); Brown v. Illinois, 442 U.S. 590 (1975) and Taylor v. Alabama, 102 S.Ct. 265 (1982), contending that his case is governed by the rulings in these cases. The facts in Petitioner's case do not admit of any such similarity.

The Petitioner had been validly arrested for an aggravated assault at a local sandwich shop. The detention in Petitioner's case was not the result of unfounded police suspicions or uncorroborated informant tips.

The rule providing for the exclusion of confessions under such circumstances was fashioned to prevent and deter unconstitutional police misconduct. The rule is intended to "compel respect for the constitutional guarantee in the only effectively available way -- by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206 (1960). The exclusionary rule has not been interpreted to preclude illegally obtained concessions or evidence in any absolute sense. Brown v. Illinois, supra; Michigan v. Tucker, 417 U.S. 433 (1974). Where the admission or confession is the act of a free will sufficiently purged of the primary taint of the unlawful invasion or detention, it is admissible. Wong Sun v. United States, 371 U.S. 471 (1963); Brown v. Illinois, supra. This exception has become known as the attenuation doctrine.

Brown amplified this doctrine by defining the appropriate test to employ in the determination to be made regarding the admission of contested confessions or evidence: Is there a causal connection between the illegality and the confession? Several factors enter into the equation. First, the Miranda warnings are an important, but not dispositive factor. The temporal proximity of the arrest and the confession and the presence of intervening circumstances bear considerable weight. More importantly, the purpose and flagrancy of the police misconduct warrant substantial consideration. This factoring test was reaffirmed in Dunaway v. New York, supra.

There were substantial attenuating circumstances in this case. From the time of the arrival of the bondsman at the

detention center to the Petitioner's final confession, he was afforded numerous amenities and rights:

1. Three separate invitations to use the phone to call an attorney. He did so on one occasion and eventually made contact with Attorney Brandenberg. He declined two subsequent offers by Sgt. Ness, saying that Brandenberg would tell him to keep his "mouth shut."

2. Petitioner was advised of his rights on two separate occasions by Sgt. Ness. Earlier that morning, shortly after his initial arrest for aggravated assault, he was advised of his rights on two occasions and specifically signed a waiver of those rights, and confessed to the sandwich shop shooting.

3. He was offered food twice. He declined the first time but accepted sandwiches the second time.

4. When returned to jail by the detectives for the first time at about 1:30 p.m., he requested time alone, cigarettes and an hour's time before he would speak with the officers again. Sgt. Ness afforded Petitioner each request.

5. Petitioner was provided with cigarettes, coffee and water throughout both interrogation sessions at the police station.

6. Petitioner did not want the first confession taped and it was not.

7. The questioning ceased on the Johnson homicides at the first session, once the Petitioner requested the opportunity to contact a lawyer. This was between 10:30 a.m. and 11:00 a.m. He was able to contact Attorney Brandenberg. Questioning did not resume until he had agreed to talk at the police station some time after 2:30 p.m. on January 19, 1980.

8. No promises of leniency or other unfair inducements were ever offered to Petitioner.

Other factors also arose. Petitioner did not confess until shortly after 2:30 p.m. some five hours after his bondsman had arrived. Between 10:30 a.m. and 1:30 p.m., Petitioner became

aware that the detectives knew about the Johnson homicides and that of his wife. Perhaps most noteworthy was that the Petitioner volunteered that he killed Barbara McMullan and two other persons for which the Petitioner was not a suspect in any way.

Assuming that the detention commenced without lawful purpose at 9:30 a.m. on January 19, 1980, this Court's previous decisions on the attenuation doctrine demonstrate that the confession to the Johnson homicides was clearly attenuated from any improper detention. Brown v. Illinois, supra; Dunaway v. New York, supra.

The New Mexico Supreme Court relied upon the principles in Brown v. Illinois, supra., regarding the attenuation doctrine. See Gilbert I, supra, at 650 P.2d 816-7. Respondent State of New Mexico also advanced this argument in the trial court and briefing before the New Mexico Supreme Court. Vol. VII, 1612-1615; Gilbert I, Ans. Bf. 8-12. Thus, regardless of whether the Gilbert I decision is correct on the question of probable cause, the opinion correctly relied upon this Court's attenuation doctrine in Brown and reaffirmed in Dunaway v. Illinois, supra.

The petition herein does not address the attenuation issue. Nor does the petition present any argument to expand or restrict the attenuation doctrine previously decided by this Court. Thus, the petition does not present either a new question or one of substantial constitutional importance. It does not merit review. Rule 17, United States Supreme Court Rules. The petition should be denied.

CONCLUSION

For the reasons presented, the Respondent State of New Mexico respectfully requests that the petition for certiorari to the New Mexico Supreme Court be denied.

Respectfully submitted,

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